No. 93-341

In The

Supreme Court of the United States

October Term, 1993

JAMES E. LAWS, JR.,

Petitioner,

v.

MARY SUE TERRY,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE EVIDENCE ESTABLISHES PETITIONER'S INABILITY TO PROPERLY PERFORM TWO PUBLIC JOBS SIMULTANEOUSLY WITHOUT THE APPEARANCE OF IMPROPRIETY OR DIVIDED LOYALTY.

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STATEMENT OF THE CASE

The Respondent, Mary Sue Terry ("Terry"), respectfully sets forth the following pertinent facts to correct and clarify Petitioner's ("Laws") statement.

As a Claims Representative in the Office of the Attorney General ("OAG"), Laws was responsible for collecting outstanding debts from local residents and citizens of the Commonwealth, primarily in the form of delinquent student loans owed the Commonwealth of Virginia. (App. C at 10-11.) While Laws had no authority to forgive or waive indebtedness, he had substantial discretion in

negotiating directly with individual debtors, assessing financial *capacity to repay, determining repayment* amounts and schedules, and monitoring debtor compliance with repayment plans. (App. C at 11; R. at 13-14, 38-43, 54-55.)[1]

The district court found that Laws "understandably had much contact with the public as a representative of the OAG." (App. C at 11.) The district court further found that "[a]mong the thousands of claims, [Laws] would inevitably have to collect from local constituents of the [Richmond] school board." (App. C at 11.) Laws' deposition testimony also conceded the impracticability of removing him from collection responsibility for constituents of the Richmond School Board. In addition to heavy caseloads and limited collections staffing in the OAG, Laws acknowledged:

> Q. Mr. Laws, how would you know, with your voluminous accounts of 1389 cases, to what extent you were dealing with individuals who were employed by the city schools or who were employed by city government or who were residents of the city?
>
> A. You really would not know just looking at the accounts. Once you get into issues, garnishments and researching issues of employment, that information comes about. You would be along in that process before

---

[1] "App." refers to the Appendix contained in the Petition and "R." refers to the Record of Proceedings before the Court of Appeals.

> you would know you were dealing with a person that had a connection.

(R. at 46.)

Laws did not previously inform his immediate supervisor or Attorney General Terry of his appointment to the Richmond School Board ("School Board"). (R. at 17-18, 49, 56.) After learning of the appointment, Terry gave Laws the opportunity to work for the OAG or the Richmond School Board, but not both positions simultaneously. (App. B at 3.) Following Laws' refusal to resign either position, Terry terminated Laws' employment with the OAG. (App. B at 3.) Terry's reasons are set out in her affidavit, as well as in her letter of July 23, 1992 to Laws which states, in pertinent part:

> This Office is required by law to opine officially on the legality of policies adopted by local government, including its School Boards. Such opinions are recognized as authoritative by the Virginia Supreme Court and regularly requested by public representatives in shaping public policy. This Office is further required to enforce State policy at the local level. For example, and specifically to the operations of our public school system, State law imposes a duty on the Attorney General to institute mandamus against any School Board that has failed or refused, and continues to fail or refuse, to comply with the State mandated standards of quality.
>
> Recent litigation with the Richmond School Board in the *Bradley* case, as well as the potential for intervention in the pending school funding case brought by several School Boards against the Commonwealth, illustrate the posture of

> adversariness that can and does exist between local and state policymakers.
>
> Our judgments, communications with clients and the public, collections and enforcement actions, and defenses of State policy must be free from any appearance of conflict or impropriety and beyond local perceptions of political influences. Our clients are also entitled to expect that their communications to us, and internal legal analyses, are absolutely privileged to them and free of any appearance of improper influence. In addition, School Board service is a substantial, on-going responsibility involving more than periodic board meetings. It entails daily communication with and advocacy for local constituents and supervision of the public school system in all its myriad operations. Creating potential for public misapprehension as to the role of this Office in local issues is contrary to the best interest of this Office.

(R. at 50; Ex. 11 to Terry Aff. in the Motion for Summary Judgment filed on November 10, 1992 in the district court.)

The district court found that Terry's decision was "content-neutral." (App. C at 7.) Even Laws conceded the absence of content-based motive. (R. at 44, 45.) The district court further found that Laws, in performing his collections job in the OAG and his job with the Richmond School Board, would face "divided loyalties as well as unavoidable appearance of impropriety . . . regardless of how well he exercised his discretion." (App. C at 12.)

In granting summary judgment for Terry, the district court stated that the "Commonwealth has a legitimate

interest in preserving the objectivity and loyalty of its employees, both real and perceived." (App. C at 13.) The United States Court of Appeals for the Fourth Circuit affirmed by an unpublished *per curiam* opinion. (App. A at 1-3.) Laws did not petition the court of appeals for rehearing or seek review *en banc*.

SUMMARY OF REASONS FOR DENYING WRIT

No important federal question is presented. The holding below turns on the facts and duties of two specific job responsibilities, and is not in conflict with any decision of this Court or that of any other United States Court of Appeals.

ARGUMENT

I. THE PETITION SEEKS REVIEW OF ADVERSE FACTUAL FINDINGS MADE BY THE DISTRICT COURT AND UPHELD BY THE COURT OF APPEALS

At base, this case presents a garden-variety disagreement with an employer's content-neutral discretion over management of the workplace and an appeal to this Court to reweigh the evidence considered below. Laws asserts on brief that his termination was unnecessary. He argues that Terry could have ordered other alternatives rather than discharging him. Laws offered no evidence on this point and consequently the record is devoid of any explanation of possible alternatives. In fact, Laws' argument below suggested he was unwilling to refrain from

activity which could create conflict. *See* Opening Ct. of App. Br. of Appellant at 14.

As a Claims Representative, Laws was duty-bound to serve the best interests of the state in zealously negotiating, monitoring and enforcing the collection of debts, including delinquent student loans involving constituents of the Richmond School Board. As a school board member, Laws would also be accountable to residents and school employees of the City of Richmond. Moreover, as Terry testified in her affidavit, the OAG could not perform beyond question its public responsibility to adjudicate, through the opinion process, the statutory powers of local school boards, as well as represent the state agency responsible for enforcing the Richmond School Board's compliance with state edicts. *See* Terry Aff. in the Motion for Summary Judgment filed on November 10, 1992 in the district court. After examining the functions of the two specific public jobs involved in this case, the district court found, as a matter of fact, that appearance of impropriety would be "unavoidable" and Laws could not properly perform both positions simultaneously without potential for conflict. (App. C at 12.)

It is well established that this Court will not reweigh evidence. *See United States v. Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Pub. Serv. Co.*, 263 U.S. 508 (1924); *Houston Oil Co. v. Goodrich*, 245 U.S. 440 (1918). This is particularly appropriate where, as here, two courts, the court of appeals and the district court, unanimously rejected Laws' factual assertions. *See Tiffany Fine Arts, Inc. v. United States*, 469 U.S. 310, 318 n.5 (1985); *United States v. Doe*, 465 U.S. 605, 614 (1984); and *United States v. Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975).

This record also provides no basis for withholding from Terry, as Laws' employer, a presumption of correctness and fairness of official action. *See, e.g., Bishop v. Wood*, 426 U.S. 341, 350 (1976) (In the absence of unconstitutional motives, official action is presumed "regular and, if erroneous, can best be corrected in other ways."); *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) ("Without a showing to the contrary, state administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.' ") Terry's judgment in this case, as set out in her letter of July 23, 1992, is entitled to reasonable deference. The reasonableness of this judgment and the concern for potential conflicts and appearances of improper influence were also affirmed by the court of appeals in its appellate review. There is simply no basis upon which the Court should reweigh or reevaluate the evidence properly established below.

II. THE HOLDING BELOW IS CONSISTENT WITH DECISIONS OF THIS COURT AND LOWER COURTS UPHOLDING CONTENT-NEUTRAL RESTRICTIONS ON PUBLIC SERVANTS SEEKING TO PERFORM SIMULTANEOUSLY TWO INCOMPATIBLE JOBS

The holding of the district court does not conflict with precedents of this Court or in the circuits.

The Court has consistently upheld content-neutral restrictions which promote integrity and public confidence in the operations of government. *See Clements v. Fashing*, 457 U.S. 957, 968 (1982); *United States Civil Serv.*

Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548, 567 (1973); and *Broadrick v. Oklahoma*, 413 U.S. 601 (1973).

> [I]t is not only important that the Government and its employees in fact avoid practicing political justice, but it is also critical that they appear to the public to be avoiding it, if confidence in the system of representative Government is not to be eroded to a disastrous extent.

Letter Carriers, 413 U.S. at 565.

The decisions below are to the same sensible effect. *See, e.g., Arceneaux v. Treen*, 671 F.2d 128 (5th Cir. 1982) (upholding on equal protection grounds content-neutral prohibitions on dual employment and office-holding); *Wilson v. Moore*, 346 F. Supp. 635 (N.D. W. Va. 1972) (upholding content-neutral bans on state employees also holding legislative seats); *State ex rel. Stephan v. Johnson*, 795 P.2d 411 (Kan. App. 1990), *appeal dismissed*, 807 P.2d 664 (Kan. 1991) (upholding content-neutral ban on state employee also holding office with State Board of Education); and *Williams v. IRS*, 919 F.2d 745 (D.C. Cir. 1990) (upholding content-neutral restrictions on outside employment).

Our national experience also affirms the importance of sustaining reasonable prohibitions on public officials and employees performing incompatible dual positions. *See, e.g.*, Sup. Ct. R. 7 (prohibiting law clerks and employees of the Court from employment deemed incompatible with functions of the Court.); Va. Code Ann. § 23-9.3 (prohibiting state employees from appointment to the State Council of Higher Education); Va. Code Ann. § 9-84.01:1(A) (prohibiting state employees from appointment to the Virginia Commission for the Arts); Va. Code

Ann. § 24.1-33 (prohibiting federal, state and local employees and officers from appointment to a local electoral board or registrar position); Va. Code Ann. §§ 16.1-69.19, 17-3.1 (prohibiting state court judges from holding "any other office of public trust"). In performance of the public trust, the legitimate interest at stake is the avoidance of improper appearances and potential conflict.

The evidence of record supports the district court's finding that Terry's decision was content-neutral, and designed to avoid improper appearances of conflict and to promote public confidence in the operations of a public law office. This factual finding distinguishes the case at bar from the content-based citations contained in Laws' Petition. This record is devoid of any evidence of censorship of ideas or viewpoints triggering First Amendment analysis, much less hostility to expressive conduct communicating a particularized message. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989).

CONCLUSION

The district court's conclusion that Laws could not properly perform simultaneously both as a Claims Representative and Richmond School Board member is a factual finding amply supported by the record. Moreover, there is no conflict among the circuits on any pertinent legal issue. Finally the decision of the district court and the court of appeals is not in conflict with any decision of

this Court. The Petition for Certiorari should, therefore, be denied.

Respectfully submitted,

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